DATE: **APR 29 1999**

CASE NOS.: 1999-CAA-00007
1999-CAA-00008
1999-CAA-00009
1999-CAA-000 10

In the Matter of

**DENNIS MCQUADE, COMMIE R. BYRUM,**
**VIRGINIA JOHNSON** and **KENNETH WARDEN**
Complainants

v.

**OAK RIDGE OPERATIONS OFFICE**
**U.S. DEPARTMENT OF ENERGY,**
**PATRICIA HOWSE SMITH, RUFUS SMITH,**
**DAN WILKEN, DOE INSPECTOR GENERAL,**
**JENNIFER FOWLER** and **IVAN BOATNER**
Respondents

**ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANTS' MOTIONS FOR PARTIAL SUMMARY JUDGEMENT, AND GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR SUMMARY DISMISSAL**

Before me are motions for partial summary judgement filed by the Complainants and a motion for summary dismissal filed by the Respondent Department of Energy (DOE).[1] The parties have answered the motions, and the issues raised therein are now ready for decision.

*Background*

On February 5, 1999, the Complainants moved for partial summary judgement on the following issues: (1) that DOE has no defense of sovereign immunity under the statutes implicated in their complaints; (2) that the complaints were all timely filed under the applicable limitation periods; and (3) that each complaint properly alleges retaliation for protected activity in filing, prosecuting and helping to prosecute a whistleblower action before the Department of Labor. DOE initially responded in opposition on February 18, 1999, urging that the motions be denied as

[1] The Complainants have also filed a motion to disqualify DOE's. Inasmuch as the time for DOE to file its answer to this motion has not expired, a ruling will be issued in a separate order.

unsupported by any cited authority, premature and/or too vague to be capable of response.[2]

On February 24, 1999, I issued a first pre-hearing order in this matter in which I ordered the Complainants to file a specific description for each Complainant of the activities engaged in which are alleged to be protected by the federal environmental whistleblower statutes by not later than March 10, 1999. I further ordered the Respondents to file a statement of all factual allegations being contested and all legal defenses being asserted by not later than March 19, 1999. I also deferred ruling on the Complainants' motions for summary judgement on the issues of sovereign immunity, timeliness and protected activity until the parties complied with the above-described requirements of the pre-hearing order.

Pursuant to the first pre-hearing order, the Complainants filed a Second Summary of Environmental Protected Activity on March 7, 1999.[3] On March 19, 1999, the Respondent Department of Energy (DOE) filed a motion for summary dismissal, alleging: (1) that the individual Respondents and the DOE Inspector General must be dismissed because there is or was no employment relationship between the Complainants and any of these Respondents; (2) that the Complainants have not engaged in protected activity; (3) that the complaints filed in this matter would constitute an improper creation of jurisdiction; and (4) that the Complainants have not established a prima facie case of discrimination under the environmental whistleblower statutes because they have not alleged or demonstrated that the Respondents took any adverse action against them. On April 16, 1999, after being granted an extension of time, the Complainants filed their responses to the Respondent's motion for summary dismissal, and they filed a new motion to disqualify DOE's counsel.

*Legal Standard for Summary Judgement*

In *Varnadore v. Oak Ridge National Laboratory et al.,* Case Nos. 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 and 3, 95-ERA-1 (June 14, 1996) *(Varnadore III), aff'd,* 141 F.3 d 625 (6th

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[2] DOE also cross-moved, pursuant to F.R.C.P. 12(e), for a more definite statement with regard to the nature of the Complainants' alleged protected activity. Since the Complainants have, pursuant to the first pre-hearing order, filed a detailed summary of the activities which they allege to be protected, DOE's motion for a more definite statement is moot.

[3] The Complainants also submitted a Complainants' First Environmental Protected Activity Summary which had been filed with Administrative Law Judge Edith Barnett in a prior proceeding, *Johnson v. Oak Ridge Operations Office*, Case Nos. 95-CAA-20, 95-CAA-21 & 95-CAA-22 in which Judge Barnett issued a recommended decision and order dismissing the complaints on February 4, 1997. Judge Barnett's decision to dismiss the complaints was based on several grounds including her finding that the Complainants' allegations, as outlined in their First Summary of Environmental Protected Activity, that security clearances had been issued to unfit or high risk individuals were not protected as they "do not constitute the assertion of a Reasonable belief that the employees referred to were about to commit violations of the CAA, SDWA, SWDA, and/or CERCLA,nd are not grounded in conditions constituting reasonably perceived violations of the Acts." Recommended Decision and Order at 13-15.

Cir. 1998), the Administrative Review Board (ARB) discussed motions for summary judgement in environmental whistleblower cases:

> A motion for summary decision in an environmental whistleblower case is governed by 29 C.F.R. §§18.40 and 18.41 (1995). *See, e.g., Webb v. Carolina Power & Light Company*, Case No. 93-ERA-42, Sec. Dec. and Ord., July 17, 1995, slip op. at 4-5. A party opposing such a motion "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 18 C.F.R. § 18.40(c) (1995). Under the analogous Rule 56(e), Fed. R. Civ. P., the non-moving party "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial . . . . [T]he [party opposing summary judgment] must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby,* 477 U.S. 242, 256-257 (1986). *See also, Celotex Corp. v. Catrett,* 477 U.S. 317(1986). If the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact, and the movant is entitled to summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. at 322-323.

Slip op. at 10 (footnote omitted, quotations and ellipsis in original). The determination of whether a genuine issue of material fact exists must be made in the light most favorable to the non-moving party. *Gillilan v. Tennessee Valley Authority,* Case Nos. 91-ERA-31 and 91-ERA34 (Sec'y August 28, 1995), slip op. at 3. With these principles in mind, I will now turn to the merits of the parties' motions.

*Sovereign Immunity and Timeliness of the Complaints*

DOE responded to the provision in the first pre-hearing order requiring it to file a statement of all factual allegations being contested and all legal defenses being asserted by filing its motion for summary dismissal. In its motion, DOE asserts no defense based on either sovereign immunity or the timeliness of the complaints. Therefore, the Complainants' motions for partial summary judgement on these two issues stand unopposed, and summary judgement is warranted.

*Protected Activity*

In response to the first pre-hearing order, the Complainants allege that they have engaged in the following protected activities:

1. With Complainant's Byrum's encouragement, Complainants Johnson, McQuade and Warden filed environmental whistleblower complaints with Wage Hour in April 1995, protected activity under the "proceedings clause" and the "opposition clause," for which all four Complainants have been retaliated against.

2. With Complainant's Byrum's open help, encouragement and assistance in the

presence of DOE lawyers at a deposition of former DOE Oak Ridge operations Manager Joe Ben La Grone on October 30, 1995, Complainants Johnson, McQuade and Warden pursued and actively litigated their environmental whistleblower proceedings, for which all four Complainants have been retaliated against.

3. With Complainant Byrum's assistance, Complainants Johnson, Warden and McQuade on December 18, 1995 filed their First Summary of Environmental Protected activity with Judge Barnett, attached incorporated herein by reference.

4. Complainants Johnson, McQuade and Warden filed environmental whistleblower complaints with Wage-Hour on August 24, 1995, incorporated herein by reference.

5. Complainants Johnson, McQuade and Warden filed environmental whistleblower complaints with Wage-Hour on October 13, 1995, incorporated herein by reference.

6. Complainants Johnson, McQuade and Warden filed environmental whistleblower complaints with Wage-Hour on November 13, 1995, incorporated herein by reference.

7. Complainants Johnson, McQuade and Warden filed environmental whistleblower complaints with Wage-Hour on January 3, 1996, incorporated herein by reference.

8. Complainants Johnson, McQuade and Warden filed environmental whistleblower complaints with Wage-Hour on May 9, 1996, incorporated herein by reference.

9. Complainants Johnson, McQuade, Warden and Byrum fled environmental whistleblower complaints with OSHA dated March 28, 1997, incorporated herein by reference.

10. Complainants Johnson, McQuade, Warden and Byrum filed environmental whistleblower complaints with OSHA on the complaints dated April 10, 1997, incorporated herein by reference.

11. Complainants Johnson, McQuade, Warden and Byrum filed environmental whistleblower complaints with OSHA dated June 13, 1997, incorporated herein by reference.

12. Complainant McQuade was quoted in an Associated Press news story in April 1995, which led to the reported "retirement" of SES manager Joe Ben La Grone as Oak Ridge Operations Manager, a post he had held since 1983. That deposition was specially ordered by the late Administrative Law Judge Barnett because Mr. La Grone said he was going to be out of the country for a year working for British Nuclear Fuels Ltd. in England. (Mr. La Grone is now a Senior Vice President with Lockheed Martin in Bethesda, Maryland, in charge of obtaining environmental restoration contracts from his former employer, Respondent DOE).

13. Complainants Warden and McQuade have appeared on local television news programs discussing their environmental, safety and health concerns relative to granting of security clearances to dangerous felons and lack of security at the Oak Ridge nuclear weapons complex, where the Nation's storehouse of enriched uranium is kept, and massive quantities of environmental pollutants have been discharged since 1943.

14. Complainants Johnson, Warden, McQuade and Byrum have cooperated with investigations into Oak Ridge security and environmental risks, including but not limited to interview with the Central Intelligence Agency in 1998, with the DOE Inspector General, with the Federal Bureau of Investigation, and shared their concerns over the years with members of Congress, including Reps. John Dingell and John Duncan, Jr, Senator Fred Thompson, et al.

15. Complainant McQuade, shortly before his notice of firing in 1997, accompanied Mr. Floyd Glenn, Jr. on a retaliatory security clearance interview at the DOE ORO Federal Building, where Messrs. Boatner and James and Ms. Hudson were present, harassing an environmental whistleblower who had reported spills from the Y-12 Nuclear Weapons Plant into East Fork Poplar Creek by DOE and its contractors.

Second Summary of Environmental Activity. The Complainants also stated that they "reserve the right to disclose further protected activity after discovery from DOE, as literally hundreds of Case Review and Analysis Sheets (R&A sheets) are responsive to discovery requests and include their contemporaneous notes about particular individuals and how their holding clearances is a threat to environment, nuclear proliferation and theft at the Oak Ridge operations nuclear facilities in Tennessee, Kentucky and Ohio." *Id*. at 3

DOE asserts that the complaints filed in this matter must be dismissed because the Complainants have not engaged in any activities protected by environmental statutes and, therefore, have not pled a *prima facie* case. Motion for Summary Dismissal at 3. In this regard, DOE points.out that Judge Barnett dismissed the April 1995 complaints filed by Complainants Johnson, McQuade and Warden based on her finding that the security clearance concerns and/or allegations raised by the Complainants, which are detailed in their First Summary of Environmental Protected Activity, were not protected as they were not grounded in conditions constituting reasonably perceived violations of the environmental statutes. Thus, DOE submits that the doctrine *of res judicata* precludes the Complainants from relitigating the issue of whether the activities which were the subject of the April 1995 complaints are protected by the environmental statutes. *Id*. at 3-5, citing *Varnadore III*.[4] DOE further argues that the filing of the April 1995 complaints does not constitute protected activity given Judge Barnett's decision that the Complainant's activities which gave rise to those complaints were not grounded in conditions constituting reasonably perceived violations of the environmental statutes. *Id*. at 58. In effect, DOE contends that a complaint is only protected if it is determined that the complaint is grounded

[4] In *Varnadore III,* the ARB concurred with the ALJ's recommendation that *res judicata* prevented relitigation of issues relating to the complainant's salary prior to 1993 as they had already been litigated and decided in a prior proceeding. *Id*. at 32.

in conditions constituting reasonably perceived violations of the environmental statutes.

The Complainants have responded to DOE's motion for summary dismissal by asserting that DOE's argument that their April 1995 complaints are not protected is shocking, simplistic and wrong. They maintain that their actions in filing, prosecuting and helping to prosecute the April 1995 complaints were protected under the environmental whistleblower protection statutes, and they urge that their motion for partial summary judgement on this issue be granted. Complainants' Response to Rest, Residue and Remainder of Respondents' Motion for Summary Dismissal at 9-12. The Complainants have not presented any argument that *res judicata* should not be applied to Judge Barnett's decision on the April 1995 complaints.

While I agree with DOE's position that the Complainants may not relitigate whether their pre-April 1995 activities are protected, its argument regarding the protected status of the April 1995 complaints distorts the clear language of 29 C.F.R. §24.2(b) and misconstrues applicable case precedent. Section 24.2 of the Regulations, which implements the employee protection provisions of the various Federal environmental whistleblower protection statutes,[5] in pertinent part states,

> (a) No employer subject to the provisions of any of the Federal statutes listed in Sec. 24.1(a), or to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 et seq., may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section.
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> (b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:
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> (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in Sec. 24.1 (a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
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> (2) Testified or is about to testify in any such proceeding; or
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> (3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

Contrary to DOE's arguments, the ARB and the Secretary of Labor have consistently held

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[5] The environmental whistleblower protection laws covered by 29 C.F.R. Part 24 are: the Safe Drinking Water Act, 42 U.S.C. §300j-9(i); the Water Pollution Control Act, 33 U.S.C. § 1367; the Toxic Substances Control Act, 15 U.S.C. §2622; the Solid Waste Disposal Act, 42 U.S.C. §6971; the Clean Air Act, 42 U.S.C. §7622; the Energy Reorganization Act of 1974, 42 U.S.C. §5851; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9610. 29 C.F.R. §24.1(a).

that the filing of a complaint with the Department of Labor is protected under the federal environmental whistleblower statutes, and they have never imposed a requirement that a complaint pass any threshold examination of its underlying merit in order to achieve protected status. *See Tyndall v. EPA*, Case Nos. 93-CAA-6, 95-CAA-5 (ARB June 14, 1996) at 5 (filing of a complaint under the provisions of the Clean Air Act (CAA) "clearly constituted protected activity"); *Bassett v. Niagara Mohawk Power Co.,* Case No. 86-ERA-2 (Sec'y September 28, 1993) at 4 (filing complaint of retaliation because of safety and quality control activities under employee protection provision of the Energy Reorganization Act (ERA) of employer is a protected activity); *McCuistion v. TVA,* Case No. 89-ERA-6 (Sec'y November 13, 1991) at 5 (filing a complaint or charge of employer retaliation because of safety and quality control activities is protected). The Secretary has similarly held that a complainant's mere contact with a Nuclear Regulatory Commission (NRC) investigator is protected even where the record is unclear as to why the investigator interviewed the complainant. *Collins v. Florida Power Corp.,* Case Nos. 91-ERA-47 and 91-ERA-49 (Sec'y May 15, 1995) at 3-4.

The absence of any requirement that a prior environmental whistleblower complaint be meritorious in order to gain statutory protection is entirely consistent with the well-established principle under the National Labor Relations Act (NLRA) that affording *complete* protection to individuals who file complaints or provide information to the National Labor Relations Board is essential to prevent the agency's channels of information from being dried up by employer intimidation of prospective complainants and witnesses. *NLRB v. Scrivener,* 405 U.S. 117, 121 (1972), *rehearing denied,* 405 U.S. 1033 (1972) (upholding NLRB's interpretation that the NLRA protects employees who give statements to a NLRB investigator but do not file charges or testify at a formal hearing).[6] The same unqualified protection has been granted to employees who file complaints with the Equal Employment Opportunity Commission pursuant to the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964. *See Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998, 1007 (5th Cir. 1969) (employee need not establish validity of his original complaint to establish a charge of employer retaliation for having made original charge); *EEOC v. Kallir, Philips, Ross, Inc.,* 401 F.Supp. 66, 74 n. 6 (S.D.N.Y.1975), *affd,* 559 F.2d 1203 (2d Cir. 1977), *cert. denied,* 434 U.S. 920 (1977). As the Eighth Circuit has observed,

> The merits of a charge made against an employer is irrelevant to its protected status. Access is protected; administrative and judicial mechanisms determine the truth, falsity, frivolousness or maliciousness of an EEOC charge or court complaint. Thus, employer retaliation even against those whose charges are unwarranted cannot be sanctioned.

*Womack v. Munson,* 619 F.2d 1292, 1298 (1980) (citations and footnotes omitted), *cert. denied,* 450 U.S. 979 (1981). In view of this clear line of precedent. I find that DOE's reliance on *Holden*

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[6] I note that case law under the NLRA is particularly relevant to interpretation of the environmental whistleblower provisions as such provisions were explicitly modeled on the NLRA. *See* S. Rep. No. 414, 92d Cong., 2d Sess. 80-81 (1972), *reprinted in* 1972 U.S.C. C.A.N. 3668, 3748-49. *See also Ewald v. Commonwealth of Virginia,* 89-SDW-I (Sec'y April 20, 1995).

*v. Owens-Illinois Inc.,* 793 F.2d 745 (6th Cir.1986), where the court held that an employee's efforts to implement an affirmative action program was not protected by Title VIPs "opposition clause" because Title VII does not mandate the implementation of affirmative action programs, is misplaced.

Based on the plain language of section 24.2(b) of the Regulations and the foregoing discussion of case law under the environmental whistleblower protection acts and related antidiscrimination laws, I find that the Complainants Johnson, McQuade and Warden engaged in protected activity when they filed and prosecuted their April 1995 environmental whistleblower complaints, notwithstanding the fact that those complaints were ultimately dismissed. Since DOE has not alleged specific facts showing that there is a genuine issue of fact requiring a hearing on this issue, I further find that partial summary judgement for the Complainants on this issue is warranted.[7]

However, as indicated above, I also find that Judge Barnett's recommended decision and order dismissing the Complainants' April 1995 complaints constitutes a judgement on the merits for *res judicata* purposes, and precludes relitigation of the issues litigated and decided therein regarding whether the Complainants' activities, which are detailed in their First Summary of Environmental Protected Activity, are protected. *Billings v. Tennessee Valley Authority,* 91-ERA-12 (ARB June 26, 1996) at 8.

*Motion to Dismiss Complaints as Constituting an Improper Creation of Jurisdiction*

DOE additionally argues that the complaints in this matter must be dismissed to prevent the Complainants from improperly creating Department of Labor jurisdiction over matters which have no rational relationship to the environmental whistleblower protection laws. The gist of DOE's argument is that the Complainants "cannot create DOL jurisdiction over a national security complaint dealing with allegations of providing security clearances to individuals in contravention of 10 C.F.R. §710 by filing an insubstantial action [i.e., the April 1995 complaints which were dismissed by Judge Barnett] under the environmental statutes." Motion for Summary Dismissal at 9. DOE's fears are unfounded since I have determined, in agreement with DOE, that the Complainants may not in this proceeding relitigate the issues decided by Judge Barnett. Thus, jurisdiction will not be asserted over any national security complaint but rather over the issue of whether the Complainants were subjected to unlawful discrimination or retaliation because they commenced proceedings under the environmental whistleblower protection statutes, because they testified, participated or assisted in such proceedings, and/or because they otherwise engaged in activities which are protected under the environmental whistleblower protection statutes.

*Motion to Dismiss Individual Respondents and the DOE Inspector General*

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[7] Since the record is not clear regarding the nature of Mr. Byrum's assistance in the filing and prosecution of the April 1995 complaints, summary judgement that he engaged in protected activity is not warranted. However, since DOE's motion for summary dismissal of his current complaints is predicated on the rejected argument that the April 1995 complaints are not protected, summary dismissal also is not warranted.

In addition to the Oak Ridge Operations Office (ORO) and the DOE, the Complainants have named five individuals (Patricia Howse Smith, Rufus Smith, Dan Wilken, Jennifer Fowler and Ivan Boatner) and the DOE Inspector General (DOE IG) as respondents in their, complaints. In its motion for summary dismissal, DOE avers that these individuals are all employed by DOE and are not the Complainants' "employer" as defined by the relevant environmental statutes. DOE similarly asserts that the DOE IG is not the Complainants' employer and that the individual Respondents and the DOE IG should be dismissed as parties because of the lack of an employment relationship to the Complainants. Motion for Summary Dismissal at 1-3, citing V*arnadore 111* at 35-36 (affirming ALJ's dismissal of an individual respondent where the complainant had not alleged that he was the individual respondent's employee) and *Stephenson v. National Aeronautics & Space Administration,* Case No. 94-TSC-5 (Sec'y July 3, 1995) at 3 (adopting ALJ's finding that only employers, as distinguished from individuals who are not employers, are subject to the employee protection provisions of the TSCA and CAA). Finally, DOE asserts that Judge Barnett previously decided that Patricia Howse Smith and the DOE IG are not Complainants' employer so that the Complainants' attempt to raise this issue again is prohibited by the doctrine of *res judicata. Id.* at 3.

In their response to DOE's motion, the Complainants do not allege that they are or were employed by any of the individual respondents or the DOE IG. However, they request I deny DOE's motion to dismiss the individual respondents and "assemble the facts for the ARB to decide whether the individual actors in this case should be found liable for their intentional discrimination, reversing prior case law that was ill-advised." Complainants' Response to Motion to Dismiss Individual Respondents and Motion to Disqualify DOE Counsel at 2.

In the absence of any factual allegations which, when viewed in a light most favorable to the Complainants, would tend to establish the existence of an employment relationship between any of the Complainants and any of the individual respondents or the DOE IG, and in the absence of any legal authority for holding individual employees who are not the Complainants' employers individually liable for conduct which violates the environmental whistleblower protection laws, I concur with DOE that dismissal of the individual respondents and the DOE IG is in order.

*Motion to Dismiss for Lack of any Tangible Adverse Action*

As a further ground for summary dismissal, DOE submits that, with one possible exception,[8] the Complainants have not shown that DOE took any tangible adverse action with respect to their compensation, terms, conditions or privileges of employment. More particularly, DOE asserts that the complainants filed by Ms. Johnson must all be dismissed as she has not

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[8] The one possible exception conceded by DOE is Complainant Warden's allegation in his October 1, 1996 complaint that he was transferred to a different position in retaliation for his appearing on a television program to discuss his concerns regarding an attempted theft of a nuclear weapon component. However, DOE contends that this complaint must nonetheless be dismissed because Mr. Warden did not engage in any protected activity. Motion for Summary Dismissal at 10, n. 3.

alleged that DOE has taken any tangible employment action with respect to her compensation, terms, conditions or privileges of employment. Motion for Summary Dismissal at 11-12.

As for Mr. McQuade, DOE contends: that his August 24, 1995 complaint should be dismissed because it is based on a letter which he characterizes as threatening but which merely encourages him to seek help from his psychiatrist and through DOE's employee assistance program; that his October 13, 1995 complaint should be dismissed because it is based on DOE's conduct in sending a pleading, which contained a letter from Mr. McQuade's psychiatrist, to Mr. McQuade's attorney at a hotel room, conduct which does not constitute a tangible adverse action and which raises an alleged violation of the Privacy Act which is within the exclusive jurisdiction of the United States district courts;. that his November 13, 1995 complaint, alleging that DOE retaliated against him by reprimanding him for requesting information under the Freedom of Information Act (FOIA), must be dismissed because the reprimand letter states that it does not constitute a tangible employment detriment; that his January 3, 1996 complaint, which alleges that DOE unlawfully retaliated against him by requiring a security clearance interview and psychiatric evaluation, must be dismissed based on *res judicata* because Judge Barnett previously dismissed this allegation since she found no evidence that Mr. McQuade had engaged in any activities protected by the environmental statutes and because no tangible adverse action was ever taken; that his May 9, 1996 complaint alleging that his access to the federal Building was discriminatorily restricted must be dismissed as such restriction was not a tangible employment action which negatively impacted his compensation, terms, conditions or privileges of employment; and that his December 16, 1996 complaint, which alleges that DOE (a) gave him little or no meaningful work and no supervision for over a year, (b) gave him an unsatisfactory performance rating, (c) forbade him representation in a grievance meeting and (d) obtained approval for such actions at the highest levels of DOE, should be dismissed because it does not allege any tangible employment action with respect to his compensation, terms, conditions, or privileges of employment. *Id*. at 12-16, 19-20. DOE further contends that whether an unsatisfactory performance rating is a tangible employment action need not be determined in this
proceeding as this issue was fully litigated before the Merit Systems Protection Board (MSPB) in a case dealing with Mr. McQuade's removal from employment for unacceptable performance. Id. at 20, n. 5.[9]

With regard to Mr. Warden, DOE urges dismissal of his May 9, 1996 complaint (alleging that DOE retaliated against him by using threatening language during a meeting), and his July 22, 1996 complaint (alleging retaliation based on statements made in a meeting attended by Messrs. Warden and Byrum and statements made in correspondence to the Secretary of Energy) on the ground that the complained-of actions do not rise to the level of a tangible employment action. Id. at 17-18. As noted above, DOE also seeks dismissal on Mr. Warden's October 1, 1996 and November 5, 1995 complaints, which raise allegations of retaliation including a changes in job assignment because Mr. Warden raised concerns about the attempted theft of a nuclear weapons component, on the ground that Mr. Warden's disclosures were not protected. Id. at 18-19.

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[9] DOE subsequently submitted a copy of the administrative judge's initial decision in *McQuade v. Department of Energy,* Docket No. AT-0432-97-0855-I-2 (April 12, 1999) affirming DOE's removal of Mr. McQuade for unacceptable performance.

Lastly, DOE contends that the two complaints involving Mr. Byrum, May 23, 1996 (alleging retaliation by conducting an interview concerning allegations that he was involved in conflicting outside employment) and July 22, 1996 (alleging retaliation based on statements made in a meeting attended by Messrs. Warden and Byrum and statements made in correspondence to former Secretary of Energy, Hazel O'Leary) also should be dismissed for failure to allege that DOE took tangible employment actions which negatively affected his compensation, terms, conditions or privileges of employment. *Id.* at 17-18.

In their response to DOE's motion for summary dismissal, the Complainants aver that "[t]his case of post-complaint retaliation concerns a hostile working environment" and that their complaints include allegations of the following retaliatory acts by the Respondents:

A. Transmission of blacklisting documents to Secretary O'Leary aimed at the Complainants,

B. Calling the Complainants "disgruntled employees" in documents circulated to the highest levels of DOE and concealed from Complainants for years,

C. Seeking to have Mr. McQuade fired for lawfully obtaining documents through FOIA and the Privacy Act,

D. Firing of Mr. McQuade, his being subjected to a retaliatory PIP,

E. Mr. McQuade's being threatened with arrest at work,

F. Violation of Mr. McQuade's doctor-patient privacy rights by Mr. Boatner by sending a psychiatric report to a hotel fax machine,

G. A reprimand for filing a FOIA request raising concerns about DOE ORO management,

H. Subjecting Mr. McQuade to a retaliatory psychiatric referral and personnel security interview where protected activity was inquired into and stigmatized,

I. Harassment, intimidation and transfer of Mr. Warden,

J. Harassment and intimidation of Mr. Byrum,

K. Threats to workers intended to chill protected activity regarding granting criminals security clearances,

L. Refusal to assign Ms. Johnson any official travel to Oak Ridge despite the nationwide nature of her inspection and evaluation duties,

M. Idling of Mr. Warden with demeaning tasks and little or no work using his

intelligence and experience, and

N. Harassment and intimidation of all of the Complainants.

Complainants' Response to Rest, Residue and Remainder of Respondents' Motion for Summary Dismissal at 2-3. The Complainants further respond that their sworn complaints establish that the Respondents' actions did affect their working conditions by creating a hostile environment, and they argue that their allegations of a hostile work environment can not be fairly considered on a "piecemeal" basis and that the overall, composite effect of the Respondents' actions must be evaluated in determining whether the Respondents' engaged in unlawful retaliation. *Id*. at 3-4.

In *English v. Whitfreld,* 858 F.2d 957 (1988) *(English*), the Fourth Circuit held that a claim of discrimination based on retaliatory harassment is cognizable under the whistleblower protection provisions of the Energy Reorganization Act (ERA). The Court found the "abusive or hostile work environment" concept of discrimination developed in Title VII cases and approved by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson, 477* U.S. 57 (1986) *(Meritor*) to be directly analogous to whistleblower discrimination, and it stated that when a superior harasses an employee because of the employee's protected whistleblowing conduct, the superior discriminates on the basis of the employee's protected activity. The Court remanded the case, which had been dismissed by the Secretary, for further consideration, and it directed the Secretary to be guided by *Meritor in* assessing whether the alleged harassment was of such nature and degree to create an "abusive or hostile working environment" amounting to discrimination. *Id*. at 963-964. The Secretary subsequently specifically agreed with the *English* court and found the principles articulated by the Supreme Court in *Meritor* and reaffirmed in *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993) (*Harris*), to be equally applicable to environmental whistleblower discrimination cases. *Varnadore v. Oak Ridge National Laboratory,* Case No. 92-CAA-2 (Sec'y January *26, 1996*) (*Varnadore 1*) at 47-48. The Secretary also held in *Varnadore* I that a showing of a "tangible job detriment" is not a prerequisite to proof of unlawful discrimination on the basis of retaliatory harassment which creates an abusive or hostile work environment:

> Neither the posting incident nor the Murphy incident were acts which involved "tangible job detriment." Rather, they were acts that related to the "environment" in which Varnadore worked. That does not mean that these incidents are not actionable, however. If these two incidents created a hostile work environment for Varnadore, and they occurred in retaliation for Varnadore's protected activity, they are remediable under the hostile work environment theory of discrimination.

*Id* at 47. With regard to the test for determining whether retaliatory harassment creates an abusive or hostile work environment, the Secretary noted that the Supreme Court has stated that such a determination can only be made by looking at all of the circumstances, *Id*. at 48, quoting *Harris* at 22-23, and he rejected a piecemeal analysis of each individual act of alleged harassment:

> A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on

> individual incidents, but on the overall scenario . . . . The factfinder in this type of case should not necessarily examine each alleged incident in a vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents.

*Id*. at 51-52 (ellipsis provided by the Secretary), quoting *Andrews v. City of Philadelphia*, 895 F 2d 1469, 1485 (3rd Cir. 1990).

From the foregoing, it is clear that the Complainants need not demonstrate that particular incidents of alleged harassment involved any tangible employment detriment to prove their claims of retaliatory' harassment. It is also clear that a determination of whether the Respondents' alleged conduct rises to the level of an abusive or hostile work environment can only be made after a full consideration of all relevant facts and assessment of the "overall, composite effect [of the alleged harassment] on the terms, conditions, and privileges of employment . . .." V*arnadore I* at 51, quoting *King v. Hillen*, 21 F.3d 1572, 1581 (Fed. Cir. 1994). Such a determination can not be fairly made on the basis of a motion for summary dismissal on a bare record which provides no means of evaluating the credibility of witnesses or meaningful insight into the relevant work environment. This matter obviously presents genuine issues of material fact which require a full evidentiary hearing. Under these circumstances DOE's motion for summary dismissal for want of actionable adverse employment action must be denied. I do, however, find that *res judicata* applies to Mr. McQuade's allegation in his January 3, 1996 complaint that he was discriminatorily subjected to a security clearance interview and psychiatric examination as this issue was previously litigated before and adjudicated by Judge Barnett. Recommended Decision and Order at 18. Finally, I disagree with DOE's claim that *res judicata* applies to the allegation in the December 16, 1996 complaint concerning the unsatisfactory performance rating given to Mr. McQuade because review of the MSPB Administrative Judge's initial decision does not indicate that the issue presented in this proceeding *(i.e.,* whether the unsatisfactory rating was given to Mr. McQuade in retaliation for protected activities under the environmental whistleblower protection statutes) was litigated before the MSPB. *Compare Billings v. Tennessee Valley Authority,* Case No. 91-ERA-12 (ARB June 26, 1996) at 8 (under the doctrine of *res judicata,* a judgement on the merits bars a second suit involving the same parties and the same cause of action).

*Conclusion*

The Complainants are entitled to partial summary judgement on the following issues: (I) that sovereign immunity is not available to shield the Respondents from liability for any conduct found unlawful based on the complaints filed in these cases; (2) that the complaints were timely filed; and (3) that Complainants Johnson, McQuade and Warden engaged in activity protected by the environmental whistleblower protection statutes by filing and prosecuting their April 1995 whistleblower discrimination complaints. The Respondents are entitled to summary dismissal of the individual respondents and the DOE IG. Accordingly,

**IT IS HEREBY ORDERED** that:

(1) the Complainant's motions for partial summary judgement are **granted** on the

following issues: (1) that sovereign immunity is not available to shield the Respondents from liability for any conduct found unlawful based on the complaints tiled in these cases; (2) that the complaints were timely filed; and (3) that Complainants Johnson, McQuade and Warden engaged in activity protected by the environmental whistleblower protection statutes by filing and prosecuting their April 1995 whistleblower discrimination complaints;

(2) the Complainant's motion for partial summary judgement on the issue of whether Complainant Byrum engaged in activity protected by the environmental whistleblower protection statutes is **denied**;

(3) DOE's motion for summary dismissal is **granted** in part and the following respondents are **dismissed**: Patricia Howse Smith; Rufus Smith; Dan Wilken; Jennifer Fowler; Ivan Boatner; and the DOE Inspector General; and

(3) DOE's motion for summary dismissal is otherwise **denied**.

Daniel F. Sutton
Administrative Law Judge

Dated: APR 29 1999
Camden, New Jersey